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In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY K. MOORE, JAMES O. INGRAM,
AND THOMAS FITZPATRICK, PETITIONERS

v.

MUHAMMED KENYATTA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

45pp

QUESTION PRESENTED

Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a damages action against a public official on the ground that the legal standards allegedly violated were clearly established at the time in question.

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The Solicitor General, on behalf of Roy K. Moore, James O. Ingram, and Thomas Fitzpatrick, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 744 F.2d 1179. The opinions of the district court (App., *infra*, 18a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1984. A petition for rehearing was denied on January 16, 1985 (App., *infra*, 33a-34a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

STATEMENT

1. Respondent brought this action for damages against petitioners, three agents of the Federal Bureau of Investigation, for alleged violations of his constitutional rights. The conduct upon which respondent's suit is based occurred between 1967 and 1969 in connection with an FBI counterintelligence program.

In the late 1960s, respondent, a black civil rights activist, was involved in several incidents of violence in and around the campus of Tougaloo College, which is located near Jackson, Mississippi (R. 882-884). These incidents included assaults on three white professors, an armed assault on a black student, and the discharging of firearms in the woods near the campus. Respondent was also fired on by other students when he attempted to steal a television. In response to these violent activities, a group of black students formed the Tougaloo College Defense Committee and distributed weapons among their members for defensive purposes. *Ibid.*

In an effort to prevent respondent from engaging in further violence, petitioners sent him a letter, ostensibly from the Tougaloo College Defense Committee, advising him that his violent actions were inconsistent with the kind of conduct the Committee

was striving to encourage. The letter warned that if respondent did not cease his violence, other, unspecified action might be necessary. Consistent with the guidelines of the FBI's counter-intelligence program, petitioners submitted the proposed letter to FBI headquarters for approval. The letter was approved by headquarters and thereafter was mailed to respondent (R. 882-886, 899).

Respondent has also alleged that petitioners disseminated derogatory information about him to the Jackson City Prosecutor and to an individual responsible for funding the Jackson Human Rights Project, an organization respondent had been instrumental in founding (R. 798). In addition, respondent's name was included on an FBI index of individuals who had established a pattern of traveling interstate to participate in demonstrations or rallies where violence had occurred (R. 882), and he was openly surveilled on two occasions (Fitzpatrick Dep. pp. 113-114, 142-148, 155-159, 214, 368-369, 390-391).

2. In 1977, respondent filed this action for damages in the United States District Court for the Southern District of Mississippi, contending that petitioners had violated his rights under the First, Fourth, Fifth, and Ninth Amendments to the federal Constitution. He also asserted state constitutional and tort claims. See App., *infra*, 23a. Following extensive discovery, petitioners moved for summary judgment in 1978 on the grounds that the action was barred by the applicable statute of limitations, that the complaint failed to state a claim on which relief could be granted, and that petitioners were entitled to absolute immunity from the state law claims. The district court denied the motion (App., *infra*, 27a-32a).

After this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), which established an objective standard for qualified immunity, petitioners renewed their summary judgment motion, contending, among other things, that they were entitled to qualified immunity on the federal constitutional claims because their conduct did not violate any clearly established rights (see 457 U.S. at 818).[1] The district court denied the renewed motion for summary judgment, stating that the targeting of respondent in the counterintelligence program violated clearly established First Amendment rights (App., *infra*, 20a-26a). The district court certified its ruling for interlocutory appeal, under 28 U.S.C. 1292(b) (App., *infra*, 18a-19a), and petitioners also filed an appeal under 28 U.S.C. 1291.

3. The court of appeals first denied the petition for appeal under 28 U.S.C. 1292(b) (see App., *infra*, 4a) and subsequently dismissed petitioners' appeal under 28 U.S.C. 1291 as well, holding that the collateral order doctrine does not permit an immediate appeal from the denial of a qualified immunity claim (App., *infra*, 1a-17a).[2]

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[1] Petitioners also reasserted their claim to absolute immunity from suit on the state law causes of action. In addition, they contended under the "extraordinary circumstances" prong of *Harlow* (457 U.S. at 819) that they were entitled to rely upon the advice and approval of FBI headquarters that their actions were lawful.

[2] The court of appeals also held (App., *infra*, 15a-16a) that petitioners' attempt to contest the denial of their claim to absolute immunity on respondent's state law causes of action was untimely and would have to await final judgment. We do not challenge this aspect of the court's decision in this petition.

REASONS FOR GRANTING THE PETITION

This case presents the same question now before the Court in *Mitchell* v. *Forsyth*, cert. granted, No. 84-335 (Oct. 29, 1984), *i.e.*, whether an order denying a motion to dismiss constitutional damages claims on qualified immunity grounds is appealable prior to trial under the collateral order doctrine. Here, as in *Mitchell*, petitioners moved to dismiss respondent's claims, arguing that they were entitled to qualified immunity under *Harlow* because they had not violated any clearly established legal standard. Here, as in *Mitchell*, the court of appeals dismissed an appeal from the denial of such a motion for lack of jurisdiction. If the judgment of the court of appeals is left standing, petitioners will have to undergo the burdens and expense of trial on the federal constitutional claims before having the opportunity to obtain appellate review of their qualified immunity defense. They will thereby forfeit an important part of the protection that the qualified immunity defense is intended to provide. See Pet. Br. 14-16, *Mitchell* v. *Forsyth*, *supra*.[3] We are petitioning for a writ of certiorari to prevent petitioners' qualified immunity rights from being irretrievably sacrificed in this way.[4]

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[3] We are providing counsel for respondent with a copy of our brief in *Mitchell* v. *Forsyth*, *supra*.

[4] We recognize that the court of appeals stated in dictum that "if [it] were to undertake review on the merits, [it] would be obliged to find that there are genuine issues of material fact concerning what the FBI agents did" (App., *infra*, 12a). As noted in our brief in *Mitchell* (at 24-25 n.16), we acknowledge that a trial cannot be avoided where there are genuine issues of material fact relating to the qualified immunity defense. Here, however, the court of appeals' dictum regarding this question is no substitute for a holding. Had

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Mitchell* v. *Forsyth*, No. 84-335.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

MARCH 1985

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the court squarely faced the merits of petitioners' qualified immunity defense, after full briefing and oral argument, it might have concluded that there were no material factual disputes relating to at least some of respondent's constitutional claims. Moreover, petitioners would have been able to seek further review of an adverse holding.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-4753

Summary Calendar

MUHAMMED KENYATTA, PLAINTIFF-APPELLEE

v.

ROY K. MOORE, JAMES O. INGRAM and
THOMAS FITZPATRICK, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Southern District of Mississippi

Oct. 29, 1984

Before RUBIN, JOLLY, and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A civil rights activist seeks damages from Federal Bureau of Investigation officers for alleged invasion of his federal constitutional rights and for state law torts. The defendants' motions for summary judgment based on qualified immunity to the federal

claims and absolute immunity to the pendent state law claims were denied. Having twice unsuccessfully sought to appeal the rulings by certification as interlocutory orders under 28 U.S.C. § 1292(b), the officers now appeal, contending that the denial of their motion, while collateral, is final in effect and, therefore, appealable as if it were a final order.[1] We find that the order will not damage defendants' legitimate interests beyond repair if appeal awaits final judgment, and hold that it is therefore not immediately appealable. Accordingly we dismiss the appeal.

I.

Muhammed Kenyatta seeks damages from three FBI agents in their individual capacities. While no fact findings have been made, we summarize what are set forth as the pertinent facts in the appellants' brief, accepting these as the version most favorable to appealability.

In the late 1960's Kenyatta was attending Tougaloo College, in Tougaloo, Mississippi, on the outskirts of the city of Jackson. He also served as editor of the Hinds County Freedom Democratic Newspaper, which published an article urging blacks to arm themselves and to protect their community with violence if necessary. The article also contained instructions for making a Molotov cocktail.

In the latter part of 1967, one or more of the agents recommended that Kenyatta's name be placed on the FBI Agitator Index, a list designed to provide FBI field officers with a summary of information on individuals "who had established a pattern of travelling interstate to participate in demonstrations or

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[1] *See* 28 U.S.C. § 1291.

rallies where violence had occurred." The three agents later participated in preparing and sending a letter to Kenyatta that falsely purported to be from the Tougaloo College Defense Committee, a student organization. The letter advised Kenyatta that his involvement in criminal activities was inconsistent with the kind of conduct the Committee encouraged and directed him to "remain away from [the] campus until such time as your conduct and general demeanor reach the desired level." It also warned that, if he did not, "we shall consider contacting local authorities regarding some of your activities or take other measures available to us which would have a more direct effect and which would not be as cordial as this note." Kenyatta alleged that this letter caused him to leave Mississippi.

Kenyatta was also involved in the Jackson Human Rights project. The Jackson City Prosecutor undertook to investigate the project on behalf of the Episcopal Church, which funded the project. Kenyatta contends that the three FBI agents made derogatory and false statements about him to the City Prosecutor. The FBI agents' brief refers to this episode as "an uncontested event," but, while they contend that they provided the City Prosecutor with no information and merely referred him to local law enforcement officers and local community members, Kenyatta contends that the agents themselves in addition disseminated derogatory information about him to both the City Prosecutor and another person. He contends that as a result of these actions he was injured by being deterred and chilled in his lawful activities and by being maligned and discredited.

Kenyatta also contends that his constitutional right to equal protection of the law was abridged because the FBI counter-intelligence program, which

prompted the agents' activities, was "infused" by "racial animus" because it was directed only at black civil rights activists.

Following extensive discovery, the defendants moved for summary judgment in 1978, one year after the suit was filed. They contended that the suit was barred by the statute of limitations, that Kenyatta had failed to state claims for which relief could be granted, and that they were absolutely immune to the state tort claims joined as pendent to the federal constitutional claims.[2]

The district court denied the motion but certified its ruling as appealable under 28 U.S.C. § 1292(b). We denied leave to take an interlocutory appeal in an unpublished order issued by Judges Ainsworth, Garza, and Sam D. Johnson. In 1982, the Supreme Court decided *Harlow v. Fitzgerald*,[3] exacting only an objective good-faith test for qualified immunity. The agents then renewed their motion for summary judgment, asserting both absolute and qualified immunity. The district court denied the motion and again certified its order as appealable. We again rejected the attempt to appeal the order as interlocutory under § 1292(b) in an unpublished order issued by Judges Brown, Tate, and Higginbotham. The agents now contend that they are entitled to appeal of right under 28 U.S.C. § 1291 because the order, while interlocutory in form, is final in effect.

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[2] They explain that they then raised only the absolute immunity defense because at that time qualified immunity could be determined only by showing good faith, *citing Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978), *cert. denied sub nom. Adams v. Reimer*, 440 U.S. 947, 99 S.Ct. 1425, 59 L.Ed.2d 935 (1979).

[3] 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

The 1983 opinion of the district judge on the renewed motion for summary judgment concerns only "the defendants' entitlement to qualified immunity." The court concludes, "we hold that defendants are not entitled to the qualified immunity enunciated in *Harlow*. The defendants' motion for summary judgment on the issue of qualified immunity from liability is denied." While the order simply denies the motion for summary judgment, it is apparent that the district judge had simply not considered the issue of absolute immunity at that time; for, in the opinion certifying the order for interlocutory appeal, the court again refers only to the qualified immunity issue. We first address the issue of appealability of the 1983 ruling on qualified immunity. Then we turn to appealability of the 1979 ruling on absolute immunity.

II.

Under the Judiciary Act of 1789 federal appellate jurisdiction is confined to appeals from "all final decisions." That policy has remained the fundament of federal appellate jurisdiction.[4] The rule permitting appeals only from final judgments "is an historic characteristic of federal appellate procedure." [5] It represents the "firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." [6]

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[4] The rule is now incorporated in 28 U.S.C. § 1291.

[5] *Flanagan v. United States*, —— U.S. ——, ——, 104 S.Ct. 1051, 1054, 79 L.Ed.2d 288, 293 (1984), *quoting Cobbledick v. United States*, 309 U.S. 323, 324, 60 S.Ct. 540, 541, 84 L.Ed. 783, 784 (1940).

[6] *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038, 52 L.Ed.2d 651, 657 (1977).

This rule is not arbitrary but functional. It helps to preserve the respect due trial judges by minimizing appellate-court interference.[7] It "reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals" and it hence is "crucial to the efficient administration of justice." [8]

In what has been called a "narrow exception" to that rule, interlocutory appeals are permitted in a small class of cases in which an order, though technically not final, nonetheless is so collateral as to be effectively unreviewable on appeal from the final judgment.[9] The FBI agents seek to fit their appeal within that class on the basis that the denial of summary judgment recognizing qualified immunity subjects the government official invoking that defense to a trial on the merits despite a central purpose of the defense, the protection it affords against not only ultimate liability but also against exposure to trial.

This court, like every other court that has considered the issue, has concluded that the denial of absolute immunity is immediately appealable.[10] The

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[7] *Flanagan v. United States,* —— U.S. ——, ——, 104 S.Ct. 1051, 1054, 79 L.Ed.2d 288, 293 (1984).

[8] *Id. See also, Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374-75, 101 S.Ct. 669, 673, 66 L.Ed.2d 571, 578-579 (1981).

[9] *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528, 1536 (1949). *See, e.g., Constructora Subacuatica Diavaz v. M/V Hiryu,* 718 F.2d 690, 692-93 (5th Cir. 1983).

[10] *Williams v. Collins,* 728 F.2d 721 (5th Cir. 1984); *Metlin v. Palastra,* 729 F.2d 353 (5th Cir. 1984) (qualified immunity ruling reviewed incident to review of absolute immunity ruling); *see Harlow v. Fitzgerald,* 457 U.S. at 806 n. 11, 102

"purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial." [11] Therefore those who enjoy absolute immunity are entitled to defeat the suit at the outset.[12] "To wait until after the trial for the appellate review of claims of absolute immunity subverts a basic rationale of the doctrine . . . ." [13] Similarly, the mistaken rejection of a defense of double jeopardy to a criminal charge subjects the accused to a trial that the Constitution forbids; hence such an order is immediately appealable.[14] For the same reason, legislators are entitled to immediately appeal denial of a

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S.Ct. at 2732 n. 11, 73 L.Ed.2d at 402 n. 11; *Nixon v. Fitzgerald*, 457 U.S. 731, 742-743, 102 S.Ct. 2690, 2698, 73 L.Ed.2d 349, 358-359 (1982); *Helstoski v. Meanor*, 442 U.S. 500, 506-08, 99 S.Ct. 2445, 2448-49, 61 L.Ed.2d 30, 35-37 (1979). *Accord Evans v. Dillahunty*, 711 F.2d 828, 830 (8th Cir. 1983); *Chavez v. Singer*, 698 F.2d 420, 421 (10th Cir. 1983); *McSurely v. McClellan*, 697 F.2d 309, 315-316 (D.C. Cir. 1982); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1207-09 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981). *See also Bever v. Gilbertson*, 724 F.2d 1083, 1086 (4th Cir. 1984).

[11] *Briggs v. Goodwin*, 569 F.2d 10, 59 (D.C. Cir. 1977) (Wilkey, J., dissenting), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978); *Forsyth v. Kleindienst*, 599 F.2d at 1207-08.

[12] *Imbler v. Pachtman*, 424 U.S. 409, 419 n. 13, 96 S.Ct. 984, 989 n. 13, 47 L.Ed.2d 128, 137 n. 13 (1976). *Accord Williams v. Collins*, 728 F.2d 721, 726 (5th Cir. 1984).

[13] *Briggs v. Goodwin*, 569 F.2d at 59; *Williams v. Collins*, 728 F.2d at 726.

[14] *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

motion to dismiss based on the Speech or Debate clause.[15]

In some measure the policy of qualified immunity is designed to protect government officials not only from being cast in judgment but from being exposed to trial. But the very reason for the distinction between those officials who enjoy absolute immunity and those whose protection is qualified is that some officials are entitled to a lesser measure of protection. Their actions may subject them to liability unless undertaken with reasonable regard for federal statutory and constitutional rights.

In *Harlow* the Supreme Court simplified the qualified immunity defense, jettisoning the provisions requirement of good faith, and announced a simple objective standard: whether a defendant violated "clearly established" law at the time of his alleged constitutional violation.[16] It reformulated the test because the prior "good faith" test was thought to raise an inherent question of fact requiring resolution at trial, a result that was "incompatible with [the Court's] admonition in *Butz* that insubstantial claims should not proceed to trial."[17] The *Harlow* Court recognized that significant societal costs attend subjecting federal officials to the "risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterence of able

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[15] *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979).

[16] 457 U.S. at 816-817, 102 S.Ct. at 2738-39, 73 L.Ed.2d at 409-410. *See McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982).

[17] *Harlow v. Fitzgerald*, 457 U.S. at 815-16, 102 S.Ct. at 2737, 73 L.Ed.2d at 408-409.

people from public service." [18] It sought to alleviate those costs by facilitating summary disposition at the threshold. Thus, insubstantial claims might be resolved quickly with minimal impact on the functioning of federal officials.

It does not follow, however, that, because insubstantial claims are to be summarily rejected, all denials of summary judgment to government officials are immediately appealable. The denial of a claim that does not encompass the right to be free from trial is not immediately appealable.[19] The expense and strain of a trial are vicissitudes that affect every party, plaintiff or defendant, who is denied a summary judgment and then must undergo a trial.[20] The trial itself transgresses the interests protected by qualified immunity only if the claim is insubstantial, and the defendant-official has nothing to appeal if he has failed to persuade a district judge that his defense is well-founded. Judges are not infallible, and errors may be anticipated in application of the *Harlow* standard like any other. Nevertheless, few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights,

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[18] 457 U.S. at 816, 102 S.Ct. at 2738, 73 L.Ed.2d at 409.

[19] *E.g., United States v. MacDonald,* 435 U.S. 850, 861, 98 S.Ct. 1547, 1553, 56 L.Ed.2d 18, 27 (1978) (speedy trial right); *United States v. Gregory,* 656 F.2d 1132, 1136 (5th Cir. 1981) (denial of motion to dismiss for vindictive prosecution immediately appealable only if right would be lost in particular case if appeal awaited final judgment); *United States v. Levine,* 658 F.2d 113, 120 (3d Cir. 1981) (federal statute of limitations). *See* Note, Federal Interlocutory Appeal of Vindictive Prosecution Claims, 50 Geo. Wash. L. Rev. 485, 488 (1982).

[20] *United States v. Gregory,* 656 F.2d at 1136.

far too few to invoke the *Harlow* policy of preventing the risk of litigation from deterring good candidates from seeking office or good office holders from performing their duties. In our litigious society, to suppose that some might abstain from valuable public service for fear that they will be subjected to the expense of frivolous litigation is sensible; that legitimate activity will be curtailed by the inability of trial judges to separate frivolous claims from clear violations of statutory and constitutional rights without appellate second-guessing is less likely.

The qualified-immunity defense also differs from absolute immunity in its more intimate relationship with the merits.[21] Absolute immunity may be determined solely on the basis of the official status of the defendant and whether he acted in the course of that duty. Qualified immunity cannot be decided without a complete determination of the nature of both the wrongful act and the law applicable at the time it was committed, in addition to those factors.

The unanimity among circuit courts in holding the denial of absolute immunity immediately appealable has therefore not carried over to the qualified immunity defense. While three courts of appeals, the District of Columbia Circuit and the First and Eighth Circuits, have held that all pretrial orders denying qualified immunity are immediately appealable under the collateral order doctrine,[22] the Third

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[21] The facts on which the merit of that defense must be determined are, as Judge Higginbotham has noted, "more clearly entwined with the merits." *Williams v. Collins*, 728 F.2d 721, 726 n. 6 (5th Cir. 1984).

[22] In *McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982), the court held that "appellate review of a denial of a motion for summary disposition must be available to ensure

and Fourth Circuits have denied interlocutory appeal.[23]

The view taken by the Third and Fourth Circuits has even firmer foundation when the basis for appealability of interlocutory orders is considered. To be appealable as final such orders must determine claims "separable from, and collateral to, the rights [or defenses] asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." [24] While appealability of collateral orders is not limited to

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that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity." In *Evans v. Dillahunty*, 711 F.2d 828, 830 (8th Cir. 1983), the Eighth Circuit agreed that, when the essential facts are not in dispute and the immunity determination is a question of law, orders denying qualified immunity are immediately appealable. In *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984), the court held that, if there is a "plausible claim" to qualified immunity, the denial of the claim is immediately appealable.

[23] In *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3021 (U.S. June 20, 1984) (No. 84-25), the court declined jurisdiction in part because the action also sought injunctive relief and a trial would therefore have been necessary regardless of qualified immunity. The court also observed, however, that "one must read much into [*Harlow*] to conclude that the Supreme Court . . . intended that denials of such motions should be immediately appealable." The Third Circuit denied a qualified immunity appeal in *Forsyth v. Kleindienst*, 729 F.2d 267, 273-74 (3d Cir. 1984), petition for cert. filed, —— U.S.L.W. —— (U.S. —— 1984) (No. ——), despite a vigorous dissent by Judge Weis.

[24] *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528, 1536 (1949).

cases that present "a serious and unsettled question," [25] the importance of the legal issues presented on appeal is a factor to be considered.[26]

In the present case, Kenyatta's claims and the asserted defenses are inseparably intertwined, a situation that, as we have already indicated, is typical. There is not only one claim, but several. Whether or not the principles on which each is to be determined were established in 1967 turns on the nature of each claimed violation and the different decisions relative to the several first amendment claims and the different equal protection argument.

Indeed, if we were to undertake review on the merits, we would be obliged to find that there are genuine issues of material fact concerning what the FBI agents did as well as legal disputes about how well established the law was when those deeds were done. As the magistrate found, "while the broad, underlying facts as recited above are uncontested, many facts more subtle (especially in the area of intent and motive), but critical to a just determination of this case, are contested and genuinely in issue." Kenyatta alleges, and has gathered some evidence in support, that the actions taken by the agents manifest racial animus and that they were undertaken in order to disrupt and inhibit Kenyatta's advocacy on

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[25] *Id.* at 547, 69 S.Ct. at 1226, 93 L.Ed. at 1536. We held appeals not limited to such cases in *Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1024 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 895, 102 S.Ct. 394, 70 L.Ed.2d 211 (1981).

[26] *Bennett v. Behring Corp.*, 629 F.2d 393 (5th Cir. 1980); *Armstrong v. McAlpin*, 625 F.2d 433, 439 n. 11 (2d Cir. 1980), *judgment vacated*, 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981).

account of its content. The agents, by contrast, contend that their actions were motivated solely by legitimate law enforcement purposes. They argue, however, that their state of mind is wholly irrelevant to their immunity. In this conclusion they are simply mistaken. As we have explained above, the *Harlow* Court eliminated the subjective prong from analysis of qualified immunity; what remains is the question whether the agents' actions violated rights clearly established at the time. Because the Court did not thereby purge substantive constitutional doctrine of all subjective issues, it did not entirely eliminate subjective inquiry from every qualified immunity analysis: some rights, including those Kenyatta seeks to vindicate, might be violated by actions undertaken for an impermissible purpose but not by the same actions undertaken for permissible purposes.[27]

In addition, the agents allege that, if their actions violated rights clearly established at the time, they are nevertheless immune under *Harlow* because, due to extraordinary circumstances, they neither knew nor should have known that their actions violated Kenyatta's rights. By raising this alternative ar-

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[27] *See, e.g., Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976) (purposeful racial discrimination necessary to constitute fourteenth amendment violation); *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) (class based animus essential for action under § 1985(3)); *Wright v. Georgia*, 373 U.S. 284, 292, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349, 355 (1963) (police officer's intention to enforce racial discrimination violates equal protection). As Justices Brennan, Marshall and Blackmun point out in their concurring opinion in *Harlow*, its standard "would not allow the official who *actually* knows that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know." 457 U.S. at 820, 102 S.Ct. at 2740, 73 L.Ed.2d at 411. (Emphasis in original.)

gument for immunity, the agents themselves create two issues of fact, one objective and one subjective: were there any extraordinary circumstances, and, if there were, did they make the agents ignorant of the constitutional implications of their actions? Kenyatta has controverted the subjective issue by presenting some evidence that tends to make the agents' actual ignorance less likely. By creating the issue for Kenyatta to controvert, the agents surrendered part of the protection from litigation that the objective *Harlow* test might have offered them.

The present case involves a legal question of importance: the appealability of the order. If, however, we hold denials of summary judgment appealable per se, the right to appeal will be assured in a large number of cases that present no significant legal issues, for in many actions brought against state officials under 42 U.S.C. § 1983, as well as in actions brought against federal officials for violation of federal constitutional and statutory rights, the defense of qualified immunity is raised. Many of these involve only the application of settled principles, not important, unresolved legal issues.

Like other courts, we consider it important that government officials be protected from the mere litigation of insubstantial claims. But, as the Third Circuit has said, "that concern over subjecting government officials to unwarranted claims is best handled through adjustment of the substantive rules of law, as the Supreme Court has recently done, and not by changing the established practice of limiting appellate review of interlocutory decisions." [28] To con-

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[28] *Forsyth v. Kleindienst*, 700 F.2d 104, 110 (3d Cir. 1983) (opinion on grant of stay) (Sloviter, J., stating in dissent the position ultimately adopted by the court, 729 F.2d at 273-74).

sider the interlocutory appeal in this case would be, as in most, a futile exercise for, if we did so, we would be able only to remand for determination of the facts essential to decision.

III.

The agents' first motion for summary judgment in December, 1978, asserted that they were absolutely immune from the plaintiff's state-law causes of action. The district court denied the motion in its order of December 21, 1979. They did not appeal that decision. The 1983 renewed motion for summary judgment purported to reassert the same state-law absolute immunity defense that had been previously rejected by the district court. The agents made no new arguments, nor did they contend that the facts or the state law had changed in any way since 1979. They relegated their discussion of this issue to a one-sentence footnote in their supporting memorandum.

The agents contend that they are now entitled to appeal the 1979 denial of their absolute immunity defense. They contend that interlocutory appeals are permissive and are not subject to the time limit set on appeals of right in Fed. R. App. P. 5. The conclusion is simply mistaken. "The procedure for taking an appeal from an interlocutory order that is appealable as of right is precisely the same as that for taking an appeal from a final judgment. The appeal must be taken in the time provided by Rule 4 of the Federal Rules of Appellate Procedure. An interlocutory appeal need not be taken merely because it is authorized, but if it is authorized, it must be timely taken or the right to take it will be lost, and no appeal will be taken until final judgment or until the entry of some subsequent appealable order."

9 J. Moore, B. Ward, J. Lucas, Moore's Federal Practice ¶ 110.21 (footnotes omitted).[29] The appeal is permissive only in the sense that, if it is not taken, the ruling remains subject to review on the appeal from the final judgment.[30] If the absolute immunity claims were subject to interlocutory appeal, the appeal should have been taken after the district court's December, 1979, denial of that claim. In addition, we see no reason to make dismissal of a pendent state-law claim the fulcrum by which the federal claims, which alone give us jurisdiction, become appealable.

The fact that the defendants nominally reiterated their state-law absolute immunity defense in their second motion for summary judgment, which was never in fact ruled on by the court presumably because the issue had been previously decided and was mentioned by the agents only in passing, does not thereby give them a second opportunity to appeal.

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[29] *Henry v. First National Bank of Clarksdale*, 444 F.2d 1300, 1305 n. 4 (5th Cir. 1971), *cert. denied sub nom. Henry v. Claiborne Hardware Co.*, 405 U.S. 1019, 92 S.Ct. 1284, 31 L.Ed.2d 483 (1972); *Winfield v. St. Joe Paper Co.*, 663 F.2d 1031, 1032 (11th Cir. 1981); *Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc.*, 579 F.2d 786, 790 (3d Cir. 1978); *Donaldson v. Pillsbury Co.*, 529 F.2d 979, 980 & n. 1 (8th Cir. 1976), *cert. denied*, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977); *United States v. Hankish*, 462 F.2d 316, 318 (4th Cir. 1972): *Dahlen v. Kramer Mach. and Engineering Products Co.*, 303 F.2d 293, 294-95 (10th Cir. 1961); *Stiller v. Squeez-a-Purse Corp.*, 251 F.2d 561, 563 (6th Cir. 1958). See also 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3911 at 498.

[30] *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 235-36 (5th Cir. 1982); 9 J. Moore, Moore's Federal Practice ¶ 110.18; 15 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3911 at p. 230 n. 82 (Supp. 1984).

IV.

The FBI agents object to an award of costs to Kenyatta. They assert correctly that appellate jurisdiction has been an issue in this appeal from the outset. Indeed, the appellants briefed the jurisdictional question in their opening appeal brief. Nevertheless, rather than simply moving to dismiss, Kenyatta filed a responding brief, thereby incurring costs that would not have been incurred had he moved to dismiss before filing his brief (or even before the agents filed their appellate brief since the jurisdictional question was obvious when they sought certification and filed a notice of appeal). For this reason, we hold that Kenyatta is not entitled to the cost of printing the brief on the merits. He is manifestly entitled to all other costs.

For the reasons given, the appeal is DISMISSED. Costs are to be taxed to appellants except the costs of printing Kenyatta's brief on the merits, which are to be borne by Kenyatta.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J77-0298(R)

MUHAMMED KENYATTA, PLAINTIFF

vs.

ROY K. MOORE, JAMES O. INGRAM,
THOMAS FITZPATRICK, DEFENDANTS

[Filed Nov. 28, 1983]

OPINION

Before the Court is the defendants' Motion for Certification of an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b). The facts pertinent to this case are fully set out in *Kenyatta v. Moore, et al.*, No. J77-0298(R) (S.D. Miss. Sept. 22, 1983) (opinion denying defendants' motion for summary judgment). In that opinion this Court denied defendants' Motion for Summary Judgment holding that defendants were not entitled to a qualified immunity as their conduct violated clearly established First Amendment freedoms. In holding that clearly established First Amendment principles were violated, the Court relied exclusively upon Supreme Court decisions.

The defendants take issue with the Court's conclusion that the holdings found in four Supreme Court cases establish clearly established law for the purpose of determining an entitlement to a qualified immunity from liability. The defendants contend that none of the cases relied upon by the Court involved actions or circumstances similar to those at issue in the suit at bar.

In order to meet the criteria of § 1292(b), there must be present "a controlling question of law as to which there is substantial ground for difference of opinion" the disposition of which "may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). The Court finds these criteria to be met in the instant case.

The Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982), left open the question and method by which the state of the law should be determined. However, the courts in *Zweibon v. Mitchell*, No. 82-1626 (D.C. Cir. Oct. 21, 1983), and *Jackson v. Hollowell*, No. 82-4138 (5th Cir. Sept. 22, 1983), searched for analogous and detailed proclamations of which the defendants should have been aware in determining whether clearly established law was violated. The Court finds that this is a controlling question of law on which there is substantial ground for difference of opinion. Additionally, the question is dispositive of this case and therefore, must be considered a controlling one. Therefore, the Court grants the defendants' Motion for Certification of an Interlocutory Appeal.

So ordered, this the 23rd day of Nov., 1983.

/s/ Dan M. Russell, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J77-0298(R)

MUHAMMED KENYATTA, PLAINTIFF

vs.

ROY K. MOORE, JAMES O. INGRAM and
THOMAS FITZPATRICK, DEFENDANTS

[Filed Sep. 23, 1983]

OPINION

I. Facts

In this opinion, the Court addresses the defendants' renewed Motion for Summary Judgment.

Muhammed Kenyatta, the plaintiff in this cause is a black citizen and was admittedly a black activist during the relevant time periods. Defendants Moore, Ingram, and Fitzpatrick, during the late 1960's, were special agents of the Federal Bureau of Investigation (F.B.I.) in the F.B.I.'s Jackson, Mississippi Field Office. The occurrences surrounding this civil action took place in and around Tougaloo, Mississippi during the time periods of November 1967 through August 1969.

In 1966 the plaintiff came to Mississippi to work with the Child Development Group of Mississippi and was so employed until 1967. In 1968, the plaintiff enrolled as a student at Tougaloo College; in March of 1969, the plaintiff was suspended for non-payment of tuition fees. Notwithstanding Kenyatta's suspension from Tougaloo, he remaind on the campus and engaged in political activity for several months. Kenyatta was actively engaged in the Tougaloo Political Action Committee and the Jackson Human Rights Project.

It is undisputed that on or about December 26, 1967, the defendants placed the plaintiff's name and biographical information on the F.B.I.'s Rabble Rouser Index, subsequently renamed the Agitator Index. This Index provided the F.B.I. field offices with a quick reference summary of information on individuals who had established a pattern of traveling interstate to participate in demonstrations or rallies where violence had occurred. The defendants also physically surveilled the plaintiff and obtained information about him from informants and overt sources.

About this same time the F.B.I. established a program called COINTELPRO, a Counterintelligence program against various subversive groups. *See United Klans of America v. McGovern*, 453 F. Supp. 836, 838 (N.D. Ala. 1978). The purpose of COINTELPRO—Black Nationalist was to prevent the coalition of black militant nationalist groups. *See Hobson v. Wilson*, 556 F.Supp. 1157, 1165 (D.C. Cir. 1982). It endeavored to "expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for vio-

lence and civil disorder." (F.B.I. Memorandum dated August 25, 1967). The Jackson Field office participated in this program. Defendants were directed to protect information so gathered from disclosure to those outside the F.B.I.

In April of 1969, while the plaintiff was still actively involved in campus political life, the defendants formulated a letter made to appear as though it had originated from a bona fide Tougaloo organization, the Tougaloo College Defense Committee, and mailed it to the plaintiff. The letter directed the plaintiff to remain away from the Tougaloo College Campus until his conduct improved and warned that if the letter went unheeded, local authorities would be contacted and measures would be taken. Soon thereafter, the plaintiff left Mississippi; he attributes his departure to the contents of the letter.

In August and September of 1969, the defendants were contacted by Attorney R.G. Nichols, then representing the Episcopal Church, who inquired about the Jackson Human Rights Project. This inquiry was made at the request of members of the Episcopal Church who were concerned about making contributions to the Project. In response to the inquiry, defendant Fitzpatrick referred Mr. Nichols to several sources of "derogatory" information, including newspaper articles, of a public and non-confidential nature. The defendants also referred Mr. Nichols to other local government and law enforcement entities known to possess non-confidential information about the Project and the plaintiff. This investigation culminated in a report, in letter form, to the individuals making the inquiry and with a copy being sent to defendants as well. In September of 1969, the defendants made a copy of the Black Manifesto avail-

able to Mr. Nichols at his request. The Episcopal Church General Assembly subsequently voted to discontinue all funding to the Jackson Human Rights Project. Kenyatta claims that the information given Mr. Nichols by the defendants was the direct cause of this failure to renew funding.

Finally, the plaintiff contends that the defendants circulated false and derogatory rumors and allegations about him to local police, students and Tougaloo faculty members.

It is the plaintiff's contention that his constitutional rights under the First, Fourth, Fifth, and Ninth Amendments were violated. The plaintiff also claims a cause of action under 42 U.S.C. § 1985(3), Article 3, Sections 11 and 13 of the Mississippi Constitution, as well as allegations of defamation and invasion of privacy.

II. Motion for Summary Judgment

The defendants contend that they are entitled to summary judgment on the basis of their qualified immunity from liability. Prior to 1982, the issue of qualified immunity was not amenable to resolution on a motion for summary judgment because of the subjective branch of the defense. *Slavin v. Curry*, 574 F.2d 1256, 1262 (5th Cir. 1978). However, "the Supreme Court's opinion in *Harlow* v. *Fitzgerald* . . . has wrought a quiet revolution in the law of official immunities." *Saldana v. Garza*, 684 F.2d 1159, 1163 n. 15 (5th Cir. 1982).

In *Harlow*, 50 U.S.L.W. 4815, 4820 (U.S. June 24, 1982), the Court held that "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitu-

tional rights of which a reasonable person would have known." Thus, *Harlow* dispensed with the subjective test of official good faith and left us with only an objective standard by which to evaluate alleged official misconduct. Therefore, this Court may properly consider the defendant's entitlement to qualified immunity on a motion for summary judgment and the question becomes the status of the law governing these defendants' actions at the time they acted.

In assessing whether a party moving for summary judgment has met "the exacting burden" of so showing, all factual showings and the inferences therefrom must be viewed most favorably to the opposing party, and all reasonable doubts about the facts resolved in his favor. *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982). Thus, the Court must accept as true the plaintiff's allegations that the defendants' actions intimidated him, discouraged him from continuing his political activities, and caused him to depart from Tougaloo College and the State of Mississippi.

As the Court stated in *Federal Election Commission v. Hall-Tyner Election Campaign Commission*, 678 F.2d 416, 419, 420 (2nd Cir. 1982), "free speech would be a hollow right indeed if it meant only that the majority remained free to express thoughts consistent with conventional wisdom. The principle of free expression requires that all groups remain unfettered when expounding their idelogies. . . . The power of a Government to repress dissent is substantial and can be exercised in a myriad of subtle ways. Privacy is an essential element of the right of association and the ability to express dissent effectively." The Court can only conclude that the in-

vestigation of the plaintiff could possibly have led to the disruption and harassment of not lawfully exercising his first amendment rights.

In *Street v. New York*, 394 U.S. 576 (1969), where the plaintiff was found to have violated a state statute by burning a flag and speaking contemptuous words about the flag, the Court stated "it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." 394 U.S. at 592. In *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931), the Court stated that "every free man has an undoubted right to lay what sentiments he pleases before the public." Similarly, in *Hague v. C.I.O.*, 307 U.S. 496, 512 (1939), the Court held that right to assemble and discuss, whether orally or in writing, is a privilege inherent in citizenship and this privilege, while it may be regulated, may not be abridged or denied. Further, in *United States v. Robel*, 389 U.S. 258, 263 (1967), the Court noted that the exercise of an individual's right of association is protected by the First Amendment.

The record before the Court supports the inference that in targetting the plaintiff in COINTELPRO, the defendants were reacting to the content of the plaintiff's speeches. Additionally, the defendants apparently based their actions on the premise that the plaintiff's associates were extremists. Furthermore, the purpose of the forged letter was to "give him the impression that he has been discredited at the Tougaloo College campus and is no longer welcomed there . . . . It may possibly also cause him to decide to leave Mississippi . . . ."

The Court does not touch upon all of the plaintiff's allegations of constitutional violations; however, bas-

ing our opinion on first amendment freedoms clearly established in the late 1960's, we hold that defendants are not entitled to the qualified immunity enunciated in *Harlow*. The defendants' Motion for Summary Judgment on the issue of qualified immunity from liability is denied.

An order in accordance with the opinion of this Court shall be submitted as provided for in the Local Rules. This the 22nd day of September, 1983.

/s/ Dan M. Russell, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J77-0298(R)

MUHAMMED KENYATTA, PLAINTIFF

vs.

ROY K. MOORE, JAMES O. INGRAM,
THOMAS FITZPATRICK, DEFENDANTS

[Filed Dec. 21, 1979]

ORDER

Defendants seek summary judgment in this action, filed in August 1977, alleging violations of plaintiff's rights under the First, Fourth, Fifth and Ninth Amendments of the Constitution of the United States, 42 U.S.C. § 1985, Article 3, Sections 11 and 13 of the Mississippi Constitution of 1890, as well as allegations of defamation and invasion of privacy.

Defendants, during the late 1960's, were Special Agents of the F.B.I. assigned to the Jackson, Misssissippi Field Office. Plaintiff, a black activist, came to Mississippi from Pennsylvania in 1966 to work with the Child Development Group of Mississippi, where he was employed until 1967. In 1968, Kenyatta enrolled as a student at Tougaloo College, a historically

black school near Jackson, where he was a student until March 1969, when he was suspended for non-payment of tuition fees. During 1968-69 plaintiff was involved in a wide variety of political and social activities in Mississippi. Notwithstanding his suspension from Tougaloo, plaintiff remained on the campus and continued to engage in political activity for several months.

It is undisputed that plaintiff's name and a brief biographical summary were placed upon the F.B.I.'s Agitator Index, which provided F.B.I. field offices with a quick-reference summary of information on individuals who had established a pattern of traveling interstate to participate in demonstrations or rallies where violence had occurred.

About this same time the F.B.I. established a program called "COINTELPRO-Black Nationalist-Hate Groups", a counter-intelligence endeavor "to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder." (F.B.I. Memorandum dated August 25, 1967) The Jackson Field Office participated in this program.

Under this program, the defendant agents obtained information about the plaintiff from both overt sources and from informants. They maintained regular contacts with other federal agencies (such as Secret Service, the Army's Military Intelligence Group, the Bureau of Alcohol, Tobacco and Firearms, the Bureau of Narcotics and Dangerous Drugs, and the Internal Revenue Service) and with state and local law enforcement authorities. Defendants were directed by F.B.I. headquarters to protect informa-

tion so gathered from disclosure to those outside the F.B.I.

In April 1969, while plaintiff was still actively involved in campus political life, defendants formulated a letter, ostensibly from "Tougaloo College Defense Committee" (a bona fide campus organization), directing plaintiff to remain away from the Tougaloo College campus until his conduct and demeanor improved, to bring no "unruly and undisciplined associates" onto campus, concluding with a warning that if the letter went unheeded, local authorities would be contacted and measures less cordial than the written warning would be taken.

About this same time, plaintiff attended the National Black Economic Conference in Detroit and became actively involved in implementing the Black Manifesto drawn up at that meeting. He left Mississippi and for the next several years made no attempt to become involved in political or social activity in the state. Kenyatta attributes his departure to reliance upon the assertions of the letter, believing himself discredited in the eyes of the student body.

In August 1969 Attorney R.G. Nichols, then City Prosecutor for the City of Jackson, made inquiry of defendant Fitzpatrick about Muhammed Kenyatta in regard to his participation in the Jackson Human Rights Project. This inquiry was made at the instance of private citizens, members of a local Episcopal Church; the Jackson Human Rights Project was, at that time, funded primarily by the Episcopal General Convention Special Program Fund. Fitzpatrick, according to Nichols and to a memorandum written by Fitzpatrick at the time, referred Nichols to several sources of "derogatory" information, including newspaper articles, of a public and non-

confidential nature. Nichols, because of his position, also had access to police records and knew of other individuals to contact. This investigation culminated in a report, written in letter form, to the individuals making the inquiry. Nichols sent a copy of the letter to Fitzpatrick as well. Apparently in 1970 the Episcopal Church did not renew its grant to the Jackson Human Rights Project (although funding was obtained from the Methodist Church and others, and the Project continues today). Kenyatta claims that the information given Nichols by the Defendants is the direct cause of this failure to renew funding by the Episcopal Church.

Finally, Muhammed Kenyatta complains that during his student days at Tougaloo College, defendants "circulated false and derogatory rumors and allegations" about him to local police, to students and to faculty, defaming his reputation. He offers no facts to support this allegation.

Defendants do not deny the contact with Nichols or that they authored the letter under the guidelines of COINTELPRO. They first assert that plaintiff has allowed the statute of limitations to run on any injury purportedly arising from the events of late spring and summer 1969.

The Court is of the opinion that plaintiff has properly characterized this *Bivens*-type suit [*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] as comparable under state law to a breach of official duties. *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976); *State for the Use of Smith v. Smith*, 156 Miss. 288, 125 So. 825 (1930). As such, the Mississippi six-year statute of limitations, § 15-1-49, Mississippi Code of 1972, is applicable.

The fraudulent acts plaintiff claims were committed against him by defendants were concealed within the Agency. Although plaintiff apparently never confronted the student committee which purportedly authored the letter in question nor pursued the source of the alleged defaming rumors, it would appear in reality he would not have been able to uncover their true source, however diligently sought, prior to the passage of the Privacy Act in 1974. Such concealment, under both the federal and state standards, tolls the running of the statute. *United Klans of America v. McGovern*, 453 F.Supp. 836 (N.D. Ala. 1978); Mississippi Code of 1972, § 15-1-67. The Court concludes that the complaint is timely filed.

Rule 56(c) of the Federal Rules of Civil Procedure provide for summary judgment only where

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . .

The Court has carefully read the file in this matter, including pleadings and depositions, and has had the assistance of lengthy and well-written briefs from counsel on both sides in this matter. While the broad underlying facts as recited above are uncontested, many facts more subtle (especially in the area of intent and motive), but critical to a just determination of this case, are contested and genuinely in issue. The cause is, therefore, not one appropriate for summary judgment.

Plaintiffs have moved to amend their complaint to clarify the issues and to conform the pleadings to the facts developed in discovery. The Court believes that justice requires it to grant leave to amend in this matter. Rule 15(a), F.R.C.P.

For the foregoing reasons, the motion of defendants for summary judgment is denied, and plaintiff's motion for leave to amend his complaint is granted.

ORDERED, this 20 day of November, 1979.

Jackson, Mississippi

/s/ John R. Countiss III
United States Magistrate

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4753

MUHAMMED KENYATTA, PLAINTIFF-APPELLEE

versus

ROY K. MOORE, JAMES O. INGRAM and
THOMAS FITZPATRICK, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 10/29/84, 5 Cir., 198—, —— F.2d ——)
(January 16, 1985)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

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FILED
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CLERK

No. 84-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROY K. MOORE, JAMES O. INGRAM,
and THOMAS FITZPATRICK,

Petitioners,

—v.—

MUHAMMAD KENYATTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JACK D. NOVIK
Counsel of Record
BURT NEUBORNE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

DAVID RUDOVSKY
Kairys, Rudofsky & Maguigan
1425 Walnut Street
Philadelphia, PA 19102
(215) 568-3190

Attorneys for Respondent

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QUESTION PRESENTED

Whether the Court of Appeals properly concluded that a denial of qualified immunity is not subject to interlocutory appeal.

STATEMENT OF THE CASE

Respondent Muhammad Kenyatta brought this Bivens damage action against three agents of the Federal Bureau of Investigation (FBI) -- the petitioners -- all in their individual capacities. Respondent alleges that the petitioners conducted political intelligence operations against him because of an invidious racial animus and because of the political content of his speech and associations, rather than for any legitimate law enforcement purposes.

A. FACTUAL BACKGROUND

In the late 1960's, Muhammad Kenyatta was an outspoken civil rights activist in Mississippi. The petitioners, then all FBI agents stationed in Mississippi, subjected Kenyatta to abusive counterin-

telligence measures under the rubric of "COINTELPRO."[1]

Among other things, the petitioners forged a letter that was intended to cause respondent to believe that he had lost political support in his community, to discourage him from speaking or inviting

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[1]The courts have encountered COINTELPRO before. See, United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980) (complaint dismissed because of statute of limitations). Although that case involved COINTELPRO-White Hate Group, as opposed to the COINTELPRO-Black Nationalist Hate Group operations in this case, the counterintelligence techniques employed were essentially the same. As recognized by this Court, even the Department of Justice has conceded that at least some of those techniques were "abhorrent in a free society." Id., at 154; see also, n.7 describing those abhorrent techniques, many of which were used against the plaintiff in this case.

See also, Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied sub nom. Brennan v. Hobson, 53 U.S.L.W. ___ (March __, 1985) which specifically involved COINTELPRO-Black and describes the political and racial characteristics of that intelligence program.

others to speak at Tougaloo College, and to threaten his well-being if he did not leave Mississippi. Contemporaneous memoranda, and the petitioners' own testimony, make clear that respondent was selected for counterintelligence attention by the petitioners because of his race and because of the content of his political speech and activities.

The petitioners also provided information about the respondent to representatives of the organizations that funded his civil rights activities. Petitioners themselves described that information as "derogatory" and admit disseminating that derogatory information in order to cause the termination of respondent's political activities. And after the funding was discontinued, the petitioners took credit for achieving that

result.

Finally, the petitioners have admitted that at no time did they ever have any evidence that respondent violated any law within the FBI's investigative jurisdiction.

B. PROCEDURAL BACKGROUND

In the course of the proceedings below, the courts have rejected every affirmative defense asserted by petitioners, including qualified immunity. That qualified immunity defense was the subject of a motion for judgment filed by petitioners subsequent to this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

After full briefing and argument, the district court denied petitioners' motion on the ground that their conduct violated

respondent's "first amendment freedoms clearly established in the late 1960's" (Pet. App., 20a, at 25a-26a). (Apparently because that clear First Amendment law was alone sufficient to deny the motion, the district court specifically declined to reach the respondent's additional contention that his racial discrimination and other claims were also sufficently well established to warrant denying the qualified immunity motion. Pet. App., at 25a.) The petitioners appealed that decision to the Court of Appeals, pursuant to 28 U.S.C. §1291.[2]

The petitioners' initial Court of

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[2]The petitioners also attempted to secure review by certification, 28 U.S.C. §1292(b). Upon petitioners' motion, the district court certified its decision. (Pet. App., 18a.) However, the Court of Appeals denied the defendants' Petition to accept that appeal.

Appeals brief argued both that (i) the issue of qualified immunity was subject to interlocutory appeal, and (ii) that if the appeal is heard, the court should reverse the decision below and find that petitioners are immune.[3]

The respondent countered with (i) a motion to dismiss on the ground that an interlocutory appeal was not proper and (ii) a full brief on the merits of the qualified immunity defense urging affirmance of the decision below, should the court hear the appeal.

The Court of Appeals considered both issues. First, it dismissed the appeal, holding that the collateral order doctrine did not permit an interlocutory appeal

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[3]The petitioners also asserted an absolute immunity claim that was rejected by the Court of Appeals. Petitioners have not sought review of that decision in this Court.

from an order denying a claim of qualified immunity. (Pet. App. 1a.) Second, the court held, on the merits, that even if it were to hear the appeal, the court "would be obliged to find that there are genuine issues of material fact" requiring remand for trial (App. Pet., 12a).

The petitioners seek review of only the "appealability" issue.

REASONS FOR DENYING THE PETITION

The Petition seeks review of only one issue: whether the denial of a qualified immunity defense is immediately appealable. That issue is currently before this Court for review in Mitchell v. Forsyth, No. 84-335.

However, in this case the Court of Appeals ruled, not only that qualified immunity was not appealable, but also

alternatively held that, even if it were appealable, the case would have to be remanded for trial because of many outstanding "genuine issues of material fact." Petition for Certiorari Appendix ("Pet. App."), 12a. Inasmuch as the petitioners do not seek review of that alternative ground for decision, this case will necessarily have to be remanded for trial regardless of how the appealability issue is decided in Mitchell v. Forsyth. Therefore, the Petition should be denied.

In a footnote (Pet., at 5 n.4), petitioners acknowledge two critical facts.

First, petitioners admit their previous concession that "a trial cannot be avoided where there are genuine issues of material fact relating to the qualified immunity defense," id., see government's

brief in Mitchell v. Forsyth, supra at 24-25 n.16.

Second, petitioners acknowledge that the Court of Appeals decision below stated that, even if the appeal were permitted, and the Court "were to undertake review on the merits," the Court would "be obliged to find that there are genuine issues of material fact concerning what the FBI agents did...," id. Indeed, the Court of Appeals described those factual issues in some detail:

> "As the magistrate found, 'while the broad, underlying facts as recited above are uncontested, many facts more subtle (especially in the area of intent and motive), but critical to a just determination of this case, are contested and genuinely in issue.' Kenyatta alleges, and has gathered some evidence in support, that the actions taken by the agents manifest racial animus and that they were undertaken in order to disrupt and inhibit Kenyatta's advocacy on account of its content. The agents, by contrast,

contend that their actions were motivated solely by legitimate law enforcement purposes....

"In addition, the agents allege that, if their actions violated rights clearly established at the time, they are nevertheless immune under Harlow because, due to extraordinary circumstances, they neither knew nor should have known that their actions violated Kenyatta's rights. By raising this alternative argument for immunity, the agents themselves create two issues of fact, one objective and one subjective: were there any extraordinary circumstances, and, if there were, did they make the agents ignorant of the constitutional implications of their actions? Kenyatta has controverted the subjective issue by presenting some evidence that tends to make the agents' actual ignorance less likely. By creating the issue for Kenyatta to controvert, the agents surrendered part of the protection from litigation that the objective Harlow test might have offered them." Pet. App., 12a-14a

Thus, since there are genuine issues of fact in this case, a trial cannot be avoided, regardless of how the

appealability issue is decided.

The petitioners contend, however, that the Court of Appeals' alternative holding -- that "there are genuine issues of material fact" requiring trial -- was merely "dictum," because the merits of their defense were not "squarely faced" by the Court "after full briefing and oral argument." That characterization of the decision below is demonstrably incorrect.

First, the parties fully briefed both the appealability issue and the merits of petitioners' qualified immunity defense in the Court of Appeals,[4] and, in that

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[4]The Court of Appeals docket relects that, on the merits:

Petitioners' (Appellants') brief was filed on April 26, 1984;
Respondent's (Appellee's) brief was filed on June 4, 1984;
Petitioners' Reply brief was filed on August 2, 1984.

The appealability issue was considered
(footnote continued)

context, thoroughly addressed the question of whether material issues of fact warranted remand for trial.

Second, a single oral argument on both the appealability issues and the merits of the defense was scheduled and conducted.[5]

Third, the Court of Appeals decision speaks for itself. It says that even if the qualified immunity issue were appealable, the Court would have been "obliged to find that there are genuine

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separately:

Respondent's Motion to Dismiss was filed on June 4, 1984;
Petitioners' Opposition was filed on June 25, 1984.

[5]Much of the Court's questioning during argument focussed on the appealability question. However, the Court did inquire at length about the existence of material factual disputes. Of course, a party does not have an absolute right to oral argument in any event. Rule 34, Fed. R. App. P.

issues of material fact" requiring a remand (Pet. App. 12a). "Obliged to find" is not the language of casual dicta; rather, it is the formulation of a considered alternative holding.

CONCLUSION

Therefore, because the only issue raised by this Petition is the appealability of orders denying qualified immunity, and because this case must be remanded for trial regardless of the outcome of that appealability issue pending for decision in Forsyth v. Mitchell, No. 84-335, the Petition should be denied.

Respectfully submitted,

JACK D. NOVIK
Counsel of Record
BURT NEUBORNE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036

DAVID RUDOVSKY
Kairys, Rudovsky & Maguigan
1425 Walnut Street
Philadelphia, PA 19102

Attorneys for Respondent